ASIA SURIA PLANTATION SDN BHD

v.

TELISAI CO-OPERATIVE LAND DEVELOPMENT SOCIETY

HIGH COURT SABAH & SARAWAK, TAWAU
DOUGLAS CRISTO PRIMUS SIKAYUN JC
[CASE NO: T-22-24-2004]
10 NOVEMBER 2013

UNINCORPORATED ASSOCIATIONS: *Societies - Co-operative society - Extraordinary general meeting (EGM) for disposal of land - Notice - Non-compliance with s. 41 Co-operative Societies Act 1993 and by-law of society - Whether notice bad in law - Whether breach of by-law - Whether breach rendered mandate given by members in EGM valid - Whether non-objection to notice legitimised breach*

CIVIL PROCEDURE: *Judgments and orders - Judgment in default of defence - Case involving landed properties - Claim for specific performance - Whether leave ought to have been obtained - Whether default judgment contravened Rules of the High Court 1980 - Whether void ab initio*

Telisai Co-operative Land Development Society ('Telisai Co-operative') comprised of residents living in the area of Tungku, Lahad Datu. The by-laws of the Telisai Co-operative states that its objectives, *inter alia*, was to carry out plantation activities and accordingly applied for an area of land at Telisai, Tungku. The lands were divided into three lots, namely, Block A, Block B and Block C. Block C was a residential area containing houses belonging to the members of Telisai Co-operative. Block A had been issued with draft title deeds whereas Block B was not surveyed and was pending renewal of the survey permit. Sometime in 1998, Telisai Co-operative entered into an agreement with Felcra Bhd ('Felcra') to develop the lands with oil palm with the profits to be shared by Telisai Co-operative and Felcra. The agreement was formalised on 30 July 2002. However, on 4 July 2002, Telisai Co-operative held an extraordinary general meeting ('EGM') and the agenda as stated in the notice was to discuss the development of Telisai Co-operative's land. Pursuant to the EGM, Telisai Co-operative executed a sale and purchase agreement for the sale of Block A and Block B to the plaintiff. Upon failure by Telisai Co-operative to fulfil its obligations to the plaintiff, the plaintiff filed the present action for specific

performance of the contract and the delivery of the vacant possession of the land. A judgment in default of defence was entered against Telisai Co-operative. However, the Court of Appeal allowed Telisai Co-operative's appeal and directed Telisai Co-operative to file its defence. The registered owner by then was the second defendant in the counterclaim, who had purchased Block A from the plaintiff. The issue for the court's determination was essentially whether there was proper mandate given at the EGM.

Held (dismissing plaintiff's claim with costs; allowing Telisai Co-operative's counterclaim against plaintiff with costs; allowing second defendant's counterclaim against plaintiff with costs):

(1) The notice of all general meetings shall contain information as to the date, time, place and the agenda. Although the time, date and place were stated in the notice in compliance with s. 41 of the Co-Operative Societies Act 1993 read together with Telisai Co-operative by-laws 27, there was clear breach of by-laws 27(1) which requires a minimum of 15 days notice. Here, there was only 12 clear days notice. Also, the fact that no one objected to the notice did not make the contravention of by-laws 27(1) proper or legitimised the breach. (paras 21, 22 & 24)

(2) The setting up, the incorporation and the existence of Telisai Co-operative was umbilically tied to the land application and subsequent approval of the land. Hence, to dispose of the land would render Telisai Co-operative to lose the original purpose and objective and perhaps the reason why it was set up. It was therefore incumbent for the board to properly issue notices to all its members and to provide full information as to the nature of the agenda and the motion to vote as it affected the existence of the Telisai Co-operative. (paras 36 & 38)

(3) There were insufficient material particulars in the notice of the nature of business to be discussed and transacted. There was also lack of transparency. The notice was bad in law as it had contravened by-law 27(1). In the circumstances, no mandate had been given by the members present at the AGM to dispose of Block A and Block B. (paras 42 & 46)

(4) The rule in *Turquand*'s case applied in co-operative societies. However, the rule is not a blanket protection to all outsiders dealing with the co-operatives. There were exceptions in which the rule cannot be invoked by an outsider or a third party who knows or ought to have known that there is an irregularity. He could not presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they are wrongly done. However, not all the witnesses had been called to give evidence. Nevertheless, court could not invoke adverse inference under s. 114(g) of the Evidence Act 1950 as the testimonies of the witnesses may cut both ways. (paras 50, 51 & 53-57)

(5) A judgment in default of defence cannot be entered without a proper application of leave and must be done either by summons or motions and not summarily disposed of during the pre-trial case management. Here, the case involved landed properties and the plaintiff prayed for specific performance. Therefore, the default judgment was in contravention of the Rules of the High Court 1980 and was thus void *ab initio*. (paras 59 & 60)

(6) When the parties were informed that there was no response from the registrar of the Co-operatives and FELCRA, the plaintiff was then put on notice that something was amiss. It would be in the interest of the plaintiff to further inquire on the status of the land, knowing that the land was fully planted by FELCRA. However there was no evidence that the plaintiff did a thorough inventory and inspection of the land and neither did he enter onto the land. The prior written approval, consent and/or sanction must be obtained from the Registrar before any disposal of Co-operative's assets. Hence, the plaintiff could not rely on the rule in *Turquand* and seek shelter therein. (paras 83, 84, 86, 102 & 103)

Case(s) referred to:

First Nominee (Pte) Ltd v. New Kok Ann Realty Sdn Bhd & Anor [1982] 1 LNS 108 HC ***(refd)***

Hubah Sdn Bhd & Ors v. Koperasi Pusaka (Penampang) Bhd [2013] 6 CLJ 837 CA ***(refd)***

Hup Seng Co Ltd v. Chin Yin & Ors [1962] 1 LNS 55 HC ***(refd)***

Morris v. Kanssen [1946] AC 459 ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

Royal British Bank v. Turquand [1856] 119 ER 886 ***(refd)***

Legislation referred to:
Co-operative Societies Act 1993, ss. 2, 41
Evidence Act 1950, s. 114(g)

For the plaintiff - Frederick Chang; M/s Chang & Kamarudin
For the defendant - Rizwandean M Borhan; M/s Yusri & Rizwan
For the 2nd defendant - Michael Denis Tan; M/s Michael Denis Tan & Co

Reported by S Barathi

JUDGMENT

Douglas Cristo Primus Sikayun JC:

Factual Background

[1] Telisai Co-operative Land Development Society ("the Co-operative") was established on 30 September 1965 and is based at Tungku in the district of Lahad Datu, Sabah.

[2] At the time of its registration, the Co-operative's members comprised of residents living in the area of Tungku, Lahad Datu. Currently, the Co-operative has 74 members.

[3] The by-laws of the Co-operative states that its objectives, *inter alia*, is to carry out plantation activities. Hence, sometime in 1965, the Co-operative applied for an area of land measuring 1,100 acres more or less situated at Telisai, Tungku, Lahad Datu, Sabah ("the said applied land").

[4] The said applied lands are divided into three lots. The first one is Block A measuring 318.8 acres more or less and the second one is Block B measuring about 353.7 acres. The third lot is Block C, a residential area containing houses belonging to the members of the Co-operative. The land under Block A has been issued with draft title deeds under Country Lease No. 115323058 whereas the land under Block B is unsurveyed and still pending renewal of the survey permit.

[5] Sometime in 1998, the Co-operative entered an agreement with Felcra Berhad ("Felcra") whereby Felcra agreed to develop the said lands with oils palm and that the profits collected from the harvest of the oil palm fruits shall be shared by the Co-operative and Felcra ("the 1998 Agreement").

[6] On 30 July 2002, the Co-operative entered into a written agreement with Felcra to formalise the 1998 agreement with Felcra. Clause 18 of the written agreement provides that the Co-operative shall not transfer or charge the said land to any party without Felcra's approval (see p. 67 of DBOD 1) Mohd Taha bin Aidala, Johani bin Abd Halim and Mohamed bin Nuron signed the agreement on behalf of the defendant's Co-operative and witnesses by Saidsaripudin bin Bahrudin.

[7] On 4 July 2002, the Co-operative held an Extraordinary General Meeting ("the said EGM"). The agenda of the said EGM as stated in the notice of the EGM was to discuss the development of the Co-operative's land. The said EGM was attended by 50 members of the Co-operative. At the end of the said EGM, 27 members of the 50 members who attended the said EGM voted to sell the said lands to a third party.

[8] However, on 14 November 2002, four members of the Co-operative's board namely Salleh bin Alibasa, Johani Abd Halim, Tasim bin Buhari and Abdul Sani bin Aid executed on behalf of the Co-operative a sale and purchase agreement dated 14 November 2002 whereby the plaintiff has agreed to purchase and the Co-operative had agreed to sell the said lands ie, Block A and Block B to the plaintiff. At the time of signing the sale and purchase agreement, only a draft title has been issued for Block A while Block B has no title (see "sale & purchase agreement at pp. 139-153 of DBOD-1")

[9] A deposit and part payment of RM150,000 has been paid to Messrs Jeffrey Chu & Co, solicitors handling the sale transaction as stakeholders who has in turn released the same to the Co-operative. A power of attorney dated 14 December 2002 was granted by the Co-operative to the plaintiff pursuant to the sale and purchase agreement.

[10] Sometime around 16 January 2003, the Co-operative had through its then chairman Salleh bin Alibasa collected the draft deeds to the said land from the lands & survey department. Consequently, a supplementary agreement was executed on 20 January 2003 between the plaintiff and the Co-operative to modify the terms and conditions of the sale and purchase agreement to the effect that it shall be the Co-operative's undertaking to obtain the approval from the Director of Jabatan

Pembangunan Koperasi's approval, to renew the RSP for survey of PT 64110030 as well as FELCRA's confirmation in writing that they shall vacate the said lands.

[11] However, since the Co-operative had failed to fulfil its obligations in the sale & purchase agreement and the supplementary agreement the plaintiff then filed this action for specific performance of a contract between the plaintiff and the Co-operative and for the delivery of vacant possession of the said land. On 27 July 2004, the High Court granted an interim injunctive orders against the Co-operative restraining them from dealing or transferring the said land and the unsurveyed land.

[12] The Co-operative solicitors the, Messrs Ansari Abdullah & Co filed a memorandum of appearance on 22 August 2004 but did not file any defence nor counterclaim. A judgment in default of defence was then entered against the Co-operative.

[13] After the judgment and order had been sealed, the plaintiff served the sealed copy of the order and judgment dated 6 March 2007 to Messrs Jeffrey Chu & Shirlin. Pursuant to this order and judgment, the plaintiff had on 9 October 2007 paid to Messrs Jeffrey Chu & Shirlin the balance purchase price of RM1,762,800 in respect of the CL115323058, the said land which has been issued with the title deed. The second portion of the lands which is referred to in the sale and purchase agreement to be approximately 353 acres is yet to be surveyed and as such the draft title deeds could not be issued.

[14] The plaintiff had paid the premium for the registration of the title deed to CL115323058 and the stamp duty in respect of the memorandum of transfer to the plaintiff and had pursuant to a sale and purchase agreement dated 16 October 2007 sold the said land under CL11532058 to the second defendant in the counterclaim, Zhen Dong Plantation (M) Sdn Bhd and caused the registration of the transfer of the said land to Zhen Dong Plantation (M) Sdn Bhd.

[15] The Court of Appeal then allowed the Co-operative's appeal on 17 August 2010 and directed the defendant to file its defence. The second defendant in the counterclaim, Zhen Dong Plantation (M) Sdn Bhd, was by then the registered owner of the said land.

Findings Of The Court

[16] I have read the cause papers and heard witnesses from all three parties. I have also read documents referred to by witnesses. I have also read the various submissions and authorities filed therein.

[17] The whole case turns on these two issues. Undoubtedly there are secondary and collateral issues which I shall deal later. The issues are:

(a) Issue of proper mandate. Was there a proper valid mandate given at the EGM held on 4 July 2002? If there was, the matter ends there.

(b) If no proper mandate was given, then what is the legal position of the two agreements and related documents dated 14 November 2002 and 20 January 2003. There are of course divergent views and position taken by the Telisai Co-operative Land Development Society as against that adopted by Asia Suria Plantation Sdn Bhd and Zhen Dong Plantation (M) Sdn Bhd.

[18] I shall deal with the issue of proper mandate first.

[19] In the preamble of the Co-operative Societies Act 1993, it talks of honesty, trustworthiness and transparency. I also refer to s. 2 where co-operative principles are spelt out and they are as follows:

(a) Voluntary and open membership;

(b) Democratic management;

(c) Limited return on capital contributed by members;

(d) Equitable division of profits;

(e) Promotion of co-operative education; and

(f) Active co-operation among registered societies.

[20] Further I bear in mind the date of the land application and the date of registration of the Co-operative. Telisai Co-operative Land Development Society was set up because of the land application. I take note the evidence of DW3 Ab Rashid's evidence on this in particular Q & A No. 8 of DW3-WS. This is

also in line with the Co-operative's objectives, *inter alia*, to carry out plantation activities as stipulated under the Co-operative by-laws 8.

[21] The law on notices is governed by s. 41 of the Co-operative Societies Act 1993 to be read together with the Telisai Co-Operative Land Development Society by-laws 27. The notice of all general meeting which is to be held shall contain information as to the date, time, place and the agenda of such a meeting. I have accordingly perused the said notice dated 21 June 2002.

[22] No doubt that the time, date and place were stated in that said notice. However, by-laws 27(1) requires a minimum of 15 days notice. The manner in which time is to be calculated is provided for under the Interpretation Acts of 1948 and 1967. I agree even counting from the date of the notice 21 June 2002 to the date of the EGM 4 July 2002 there were only 12 clear days. There is therefore a clear breach of by law 27(1).

[23] The fact that no one objected to this short notice should not be a point in contention. However it would have been if someone had raised on objection at that meeting and the majority present then had voted to sanction with approval the short notice.

[24] I hold the fact that no one objected to the said notice does not make the contravention of by law 27(1) proper or legitimise the breach.

[25] I shall now go on the agenda. The agenda was stated as follows:

> Pembangunan Tanah Koperasi Telisai Co-operative Land Development Society" or "development of Telisai Co-operative Land Development Society.

[26] The agenda to be discussed at the said meeting was on the development of the Co-operative land. There is no indication or notice of any proposed sale of the land. To the ordinary member it must mean that the meeting was convened to discuss "pembangunan tanah Koperasi Telisai" and only that and I so hold. It is up to the ordinary members whether to attend the said meeting to discuss the development of the land as the discussion may not affect materially his rights as a member.

[27] Because we do not have the benefit of hearing from the then secretary Encik Johani and the then chairman Encik Salleh bin Alibasa we are unable to ascertain why the agenda was stated as so. A

[28] The accepted principle when construing a notice is that it should be regarded as a business document and to be given a fair business construction so that the members of the Co-operative to whom the notice was addressed to would understand it. B

[29] Bear in mind the honesty, trustworthiness and transparency as envisaged in the preamble to the 1993 Act. The notice must be transparent and details contained therein must be accurate and honest. C

[30] In construing a notice setting out the objects and nature of business at the meeting the question to be considered is what meaning the ordinary member of the Telisai Co-operative Land Development Society would attribute to the notice at the time they receive it. D

[31] It must be noted nevertheless that there is an equitable principle that it is the fiduciary duty of Co-operative board not to mislead members should a vote is intended. And this should be clearly stated. E

[32] Bear also in mind the social and educational background of the members/shareholders of the Co-operative. We have one who gave evidence who is an illiterate (DW6 Tony Kassim). Most of them are kampong folks residing at the kampong nearby to the said land. F

[33] Considering the equitable rule aforesaid, it should be borne in mind, the board calling for the EGM must use a clear and unambiguous language and the notice must give fair and reasonable information so that the members will understand what is actually proposed to be done. G

[34] A notice must give fair warning of what is to be submitted at a meeting. It must be an informative document or must be businesslike or reasonable. H

[35] Nevertheless sufficiency of information is a matter of fact and degree depending always on the circumstances of each case and generally I agree that the member is to be regarded as a man of ordinary prudence. I

[36] The setting up, the incorporation and the existence of Telisai Co-operative Land Development Society is umbilically tied to the land application and subsequent approval of the land. And this I hold.

[37] Hence to dispose of the land (part A and part B) would render the co-operative to lose the original purpose and objective and perhaps the reason why it was set up.

[38] It is therefore incumbent on the board to properly issue notices to all its members and to provide full information as to nature of the agenda and the motion to vote as it affects the existence of the co-operative.

[39] The principle is not that the members must be told of everything or that the board must disclose everything. The rule is that the members must be told and their attention must be drawn to at least the principal facts and how voting one way or the other would affect their interest and their pockets.

[40] The board should have drawn up a paper, bearing in mind that the core business of the Co-operative would no longer exist with the intended sale. It should also lay down the consequences.

[41] I note that earlier at the Annual General Meeting ("AGM") there was an attempt to persuade member to sell 700 acres of the Co-operative land to Syarikat Pan Mewah Sdn Bhd. I refer to the meeting held on 24 February 2002 (p. 55 DBOD-1). From the minutes I note the "bait" used by some members as recorded. The lure is "kepada mereka yang ingin menunaikan Fardhu Haji". See the minutes of the said meeting at p. 62 of DBOD-1 when Encik Johani who was acting as temporary chairman during the said AGM in his closing speech tried to persuade the members to consider the suggestion made by Encik Salleh to sell the land measuring 700 acres to Syarikat Pan Mewah Sdn Bhd so that the members can utilise the proceed of the sale of the land to set up their own businesses and perform their pilgrimage at Mecca.

[42] Given the above, I rule that the notice dated 21 June 2002 is bad in law as it had contravened by law 27(1). Adequate time must be given as provided for, so that should a member wish to attend he may make arrangement to attend. I accept that not all the members reside at Kampong Telisai. Some may be working else where such as Kota Kinabalu. See evidence of DW3 Ab Rashid bin Amsani who resides at Lot 4, Lorong Lindah 1, Taman

Teluk Likas, Kota Kinabalu, Sabah. I also rule that there are insufficient material particulars in the notice of the nature of business to be discussed and transacted. Lack of transparency is very obvious. By law 27(2) was not complied with and members were not adequately informed.

[43] I refer to the case of *Hup Seng Co Ltd v. Chin Yin & Ors* [1962] 1 LNS 55; [1962] 1 MLJ 371 and apply the legal principles stated therein to our present case.

[44] In that case Suffian J (as he then was) held that the notices calling the meeting failed to comply with art. 6 of the company in that the notices did not specify the general nature of the business to be transacted at the meeting. This was a fatal flaw to the validity of the meeting and the proceedings of that meeting must be held to be void and of no effect.

[45] And in the case of *First Nominee (Pte) Ltd v. New Kok Ann Realty Sdn Bhd & Anor* [1982] 1 LNS 108; [1983] 2 MLJ 76, the notice calling for a meeting was sent 11 days before the meeting was held and therefore three days short of the length of service required under the memorandum and articles of association of the company. The said notice was defective for being insufficient notice and accordingly meeting was ineffective. I apply the reasoning in above cases to our present suit.

[46] I therefore ruled that no mandate was indeed given by the members present at the meeting held on 4 July 2002 to dispose off their lot A and lot B.

[47] The above ruling on the mandate was made on 18 April 2013, I then directed the parties to address me on the second issue ie, if there was no proper mandate given what then is the legal position of the agreements dated 14 November 2002 and 20 January 2003 entered between the vendor Telisai Co-operative Land Development Society and Asia Suria Plantation S/B and the subsequent sale to Zhen Dong Plantation (M) Sdn Bhd.

[48] In particular I wanted parties to fully argue on the applicability of the case of *Royal British Bank v. Turquand* [1856] 119 ER 886 and the principle of indoor management to our present case involving co-operatives, as a co-operative set up is very different from that of a company incorporated under the Companies Act 1965 and operates differently. The preamble in the two incorporating Acts are different.

[49] Accordingly all three parties filed their submissions. I thank counsel for the second defendant in the counterclaim Mr Michael Denis Tan for providing me a copy of the Court of Appeal judgment in *Hubah Sdn Bhd & Ors v. Koperasi Pusaka (Penampang) Bhd* [2013] 6 CLJ 837 before it was published in the law journals in August 2013.

[50] Counsel for Telisai Co-operative submitted that that rule in *Turquand* case should not be applied to Co-operatives and should be limited to companies only. This is because of the different set ups in the two incorporating Acts. There are merits in counsel's arguments. But since the Court of Appeal held that the *Turquand* rule applies in co-operative societies, that ruling binds me and I shall apply the same in our present case. The said judgment was recently upheld by the Federal Court sitting at Kota Kinabalu.

[51] But this rule is not a blanket protection to all outsiders dealing with the co-operatives. There are exceptions. See *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793. Hence that rule cannot be invoked by an outsider or a third party who knows or ought to have known that there is an irregularity. He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done.

[52] Hence has the evidence adduced before this court disclose that Asia Suria should have been put on enquiry? And equally important what exactly was the role of PW3 who claimed to be the lawyer acting for the Co-operative?

[53] Unfortunately in our present case not all the principal actors were called to give evidence and this led to Mr Chang urging this court to involve s. 114(g) of the Evidence Act 1950 to draw adverse inference for the non-calling of the crucial witnesses namely Salleh Alibasa, Johari bin Abdul Halim and Saidsaripudin.

[54] I am of the opinion that Salleh Alibasa, Johani Abdul Halim and Saidsaripudin are more Asia Suria's witnesses. I say this because all three can confirm and testify the issuance of the notice of the calling of the EGM and AGM, why it was necessary to call for such a meeting as the AGM was just held a couple of months before when the proposed sale of the land was discussed, the circumstances that led to the subsequent board meetings in Kota Kinabalu, the appointment of the lawyer for the Co-operative and

payment of legal fees if any, the payment and receipt of the RM150,000 as a deposit or other monies paid into the account of the Co-operative after the signing of the sales and purchase agreement and supplementary agreement and the reasons for the latter and the present whereabouts of this RM150,000.

[55] Likewise Saidsaripuddin could also shed some light.

[56] But neither Mr Chang or Mr Rizwandean wanted to call any of the three for reasons best known to them and we are none the wiser.

[57] As the testimonies of the three, it may cut both ways. I am not prepared to invoke s. 114(g) of the Evidence Act 1950.

[58] Next is the issue of delay and laches. Again for this I hold both the then counsels for the Co-operative and Asia Suria equally to be blamed. Both counsels who had appeared before Her Ladyship then, as officers of the court should have drawn her attention to the relevant *proviso* of the Rules of the High Court 1980 that a judgment in default of defence cannot be entered without a proper application for leave and must be done either by summons or motions and not summarily disposed off during the pre-trial case management.

[59] Any default judgment is in contravention of the Rules of High Court 1980 as this case involves landed properties and amongst the prayers sought for was for specific performance.

[60] As such default judgment obtained is void *ab initio*. The defendant is entitled to set aside the same as of right. Hence the Court of Appeal was correct in setting aside the default judgment.

[61] As I have said, since the principal actors were not called as witnesses this court will have to look at the documents that were part of the evidence. Again I directed the parties to look into the *Geo McKnight*'s case cited in *Haron Mundir*'s case. This is because the pleadings in this matter ie, the sales and purchase agreement and the subsequent supplementary agreement were not well developed for purposes of the *Turquand* rule. But both agreements are documents which have been tendered in court and formed part of the evidence. In fact all parties agreed to the existence of these agreements. Is court not entitled to proceed on the evidence that is deems most accurate and trustworthy, especially since both sides agreed on the existence of the two documents?

[62] I am of the opinion that this whole case turns on the evidence related to the preparation and signing of the supplementary agreement doing away with the condition precedents provided for in the main agreement.

[63] Was Asia Suria put on notice that something is amiss in the transaction to purchase the two pieces of land belonging to the Co-operative?

[64] The plaintiffs claimed that PW3 was the lawyer for the Co-operative and not the lawyer for them. Counsel for the defendants however disputed this and say that the letter appointing PW3 was not genuine. In fact there was never a meeting endorsing such an appointment. See evidence of DW3 Ab Rashid Amsani denying the purported meeting of 30 September 2002 appointing Messrs Jeffrey Chu & Co. Unfortunately there was no corroborative evidence adduced such as bills or receipts issued by the said legal firm to the Co-operative for payment legal advice and/or for the preparation of the documents related to the sale of the Co-operative two pieces of land. All that we have is the evidence of PW3 himself.

[65] Let us now examine the evidence of PW3 and the role he played. According to him sometime in October 2002 he was instructed by the chairman and the committee of Telisai Co-operative to act and to prepare a sales and purchase agreement dated 14 November 2002 between them and Asia Suria in respect of two pieces of land now known as CL115323058 and an unsurveyed lot following the EGM held on 4 July 2002. A power of attorney was also prepared dated 14 November 2002 pursuant to the sales and purchase agreement.

[66] He was instructed that the committee have the mandate and authority to sign and seal the sale agreement.

[67] He was also instructed that FELCRA had planted oil palm between three to four years old on the said land and that FELCRA would vacate the said land unconditionally upon reimbursement of the development costs.

[68] PW3 further stated that prior to his attestation of the sales and purchase and power of attorney and other related documents he duly explained the contents therein and the signatories fully understand the contents before they execute.

[69] Subsequently a supplementary agreement dated 20 January 2003 was signed between the parties to rephrase the principal agreement to state that it is the Co-operative's obligation to obtain the approval of the Director of the Jabatan Pembangunan Koperasi Sabah amongst others, since there is no legal obligation to obtain such a consent. PW3 stated that the contents of the supplementary agreement were read and explained to the signatories and they fully understand the contents.

[70] Problems then arose between the Co-operative and Asia Suria and legal action was commenced by Asia Suria against the Co-operative.

[71] Subsequently PW3 was informed by the purchaser's solicitors that a judgment in default was granted by the Tawau High Court Judge-in-chambers against the Co-operative because of the failure to file defence. Pursuant to this judgment the plaintiff paid into PW3's account the balance of the purchase price of RM1,762,800 in respect of CL115323058 and receipt was issued.

[72] On 26 June 2008 PW3 wrote to the Co-operative that the transfer of the first portion has been accepted for registration at the central land registry and that the balance of purchase price has been paid to his legal firm.

[73] To date the Co-operative has not inform PW3 of any termination of the sales and purchase agreement or of any cancellation except that his service was terminated.

[74] In a number of conveyancing agreements and transactions that I have come across during my practice days which involved the sales and purchase of co-operative assets particularly landed properties, the prior consent of the registrar of co-operatives is always sought and obtained.

[75] It would seem to be a prudent practice to obtain such an approval bearing in mind that each individual co-operative member is a shareholder and have one vote and that the registrar is designated by law to ensure the proper management and running of the co-operative society, that prior consent or sanction be first obtained before any disposal of the assets of a co-operative. The registrar is there to ensure that the affairs of the co-operative are conducted in honesty, trustworthiness and transparent.

[76] That being so, it is imperative that we look into the reasons why there is a need to do away with the prior approval or consent of the said registrar clearly stated so in the sales and purchase agreement dated the 14 November 2002 and hence the supplementary agreement.

[77] Of course I bear in mind PW3's assertion that there is no legal requirement to do so.

[78] From the evidence of PW3 he said that he wrote to the registrar and FELCRA on a few occasion but failed to get any response from them. Is it then sufficient for PW3 as the lawyer for the Co-operative just to rely on correspondence to get the necessary approvals? Does he not have to go the extra mile to either telephone or seek an appointment to see the registrar to enquire why there was no response to his letters to get the necessary approval or consent? Is his duty as a lawyer limited only to seek the said approval or consent by written correspondence?

[79] Once there was no response either from the registrar and FELCRA, was he not put on notice that something was amiss? After all, it is not as if FELCRA and the registrar have both rejected. It is just that there was no response.

[80] Since there was no response from the registrar and FELCRA what was the position taken by Asia Suria and the then board members of the Co-operative? Here the evidence of Johani Abdul Halim and the other then members of the Co-operative board are crucial but unfortunately they were not called.

[81] I believe that PW3 must have informed the parties that no response to his letters were forthcoming from both FELCRA and the registrar.

[82] And parties must have agreed to enter into a supplementary agreement whereby the conditions precedent provided for in the sales and purchase agreement be circumvented and passed and the onus to get such an approval, be the obligation of the Telisai Co-operative.

[83] I am of the firm view that when PW3 informed the parties that there was no response from the registrar and FELCRA, Asia Suria was then put on notice that something was amiss. After all if everything was in order, with the resolution and mandate from

Telisai members, there would have been a positive response from both the registrar and FELCRA. As a purchaser who had paid a deposit of RM150,000 it would be reasonable to expect that Asia Suria to enquire further why such a response from both were not forthcoming.

[84] In fact PW5 Mr Chang Vui Enn in his witness statement states that as to any agreement with FELCRA the plaintiff Asia Suria do not have any notice of such an agreement that prohibits transfer without FELCRA's prior approval. Bear in mind that earlier on in his statement he said that the land was fully cultivated with oil palm crops between nine to ten years of age by FELCRA. This beg the questions, as an interested buyer, knowing that the land was fully planted by FELCRA would it not be in his own interest to enquire further from FELCRA the status of the fully planted land, instead of only listening to one side ie, the then board of directors of the Co-operative.

[85] I do not think that Mr Chang Vui Enn has acted as a prudent businessman.

[86] I further note that there is nothing in his evidence that he did a thorough inventory and inspection of the land in question. He did not even enter onto the land. He only did a perimeter survey from the outside.

[87] Surely PW5 must be put on notice as to why he could not enter inside the plantation for inspection since he is an interested purchaser and the board members had told him that the land is for sale.

[88] I am quite certain in any ordinary transaction of similar nature of a sale of an oil palm plantation, full access to the land would be given, a joint inspection will be held to determine the exact acreage, number of trees planted and if so, their age, area taken up by the infrastructure such as roads and all books will be made available and due diligence be done. That would be the norm between a willing seller and a willing purchaser. Anything short of that will give rise to suspicions that the transaction is not above board.

[89] And because of the substantial amount of purchase price involved both parties are normally represented by their own legal advisers. But this case is devoid of all the above.

[90] In so far as the agreement between the Co-operative and FELCRA is concerned, PW3 was aware of this agreement. He wrote a letter dated the 23 October 2002 to FELCRA requesting for a copy of the said agreement amongst others. There was no response. Yet without the benefit of having that copy of agreement PW3 drafted the sales and purchase agreement and the parties signed the same on 14 November 2002 some three weeks later.

[91] I note that since PW3 was aware that FELCRA was developing the land and that there is a proposal to reimburse FELCRA for the development costs, yet PW3 as the lawyer for the Telisai Co-operative did not seek or obtain the financial details from FELCRA. If such financial details were not forthcoming and are unknown to the vendor and purchaser how would they hope to resolve the payment or reimbursement of the development cost and eventually to obtain consent from FELCRA to give up possession of the said land? It is an integral part of the sale and purchase agreement that FELCRA is to be reimbursed. If not Asia Suria is unlikely to get possession of the oil palm plantation. Any reasonable purchaser in Asia Suria's shoes would know this. Yet PW3 did not do so. Even if it is the obligation of the Telisai Co-operative (following the supplementary agreement) to obtain the financial details from FELCRA, if FELCRA refuses, Asia Suria will still be unable to get possession of the land in question. Any reasonable person would have foreseen this.

[92] Some nine days earlier the registrar's office of the co-operatives wrote a letter dated 5 November 2002 to Telisai Co-operative informing them of the receipt of objections on the sale of the land.

[93] It is of course arguable that the letter of the 5 November 2002 may not have been communicated to PW3 or brought to the plaintiff's attention, but if PW3 had taken a more proactive approach to enquire further from the registrar's office, after he had no response to his letters, he definitely would found the reasons for the non-response to his earlier letters, and that there were objections to the proposed sale.

[94] PW3 must know that he is acting for Telisai Co-operative and not certain members of the board of directors only. But the manner that he had conducted himself showed that he had acted in the interests of certain board members only.

[95] Of course it did not help PW3 when he acted on the instructions of Asia Suria, asking the police for the draft title to be given to him.

[96] When the draft was given to him PW3 did not inform the Telisai Co-operative of this. His response in answer to questions posed to him was that the Co-operative committee had changed and that the new committee had not contacted him. This lends credence to what I have alluded earlier that PW3 was acting in the interests of certain board members and not the Telisai Co-operative as a whole. Had he wanted to do so, he could have easily obtained the address of the Co-operative or the names of the new board of directors and request for further instructions.

[97] Given the above facts that I have narrated, I hold that Asia Suria must have been put on notice when it became plain to them that the co-operatives authority did not respond to PW3's letters requesting for their approval.

[98] Further FELCRA too did not respond. FELCRA was in possession of the land and was then developing other parts of the land. When there was no response from the two, Asia Suria must know that something was amiss. They were put on notice. They should have made reasonable enquiries. Due to the non-response, they must know that no approval was forthcoming from the co-operatives authority and FELCRA was unwilling to cooperate. But Asia Suria prefer to proceed to go further after being advised and I would assume from PW3, that there is no legal obligation to obtain prior approval before disposal of any co-operative land. Whilst that may be legally correct, it is also unwise because the registrar of co-operatives may have reasons why he did not respond.

[99] I hold that Asia Suria with this knowledge that there was no response from the registrar and FELCRA would be affected by this knowledge since approval from these two authorities are said to be conditions precedent as stated in the sales and purchase agreement signed on 4 November 2002. This would put any reasonable person on inquiry, in other words, they would be deemed to know what a reasonable person would infer from the known facts. The material time at which there must be knowledge or means of knowledge is the time of entry into the transaction.

[100] Lord Simonds in *Morris v. Kanssen* [1946] AC 459 made it clear that an outsider cannot invoke the benefit of the *Turquand* rule if he is put upon inquiry. He said:

> He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done.

[101] Hence if Asia Suria had properly enquired after being put on notice from the co-operatives authority, Asia Suria would have been told that no proper mandate had been obtained for the sale of the Telisai land and that there were objections to the sale.

[102] In any event, in view of the Court of Appeal's decision in *Hubah*'s case that the *Turquand* rule applies, it is now becomes imperative that prior written approval, consent and/or sanction must be obtained from the registrar of co-operatives before any disposal of co-operative's assets in order to comply and fulfil the co-operative's objectives of honesty, trustworthiness and transparency.

[103] In the circumstances I rule Asia Suria cannot rely on the rule in *Turquand* and seek shelter therein.

[104] Since I had earlier ruled that there was no proper mandate, I dismiss therefore the plaintiff's claim with costs.

[105] I allow the Telisai Co-operative's counterclaim as against the plaintiff with costs.

[106] I also allow second defendant's counterclaim against Asia Suria with costs.

[107] Having heard all parties on 8 November 2013 on the issue of costs and consequential orders, I order cost of RM100,000 and RM10,000 for disbursements payable by Asia Suria to Telisai Co-operative. Zhen Dong Plantation (M) Sdn Bhd to pay costs of RM20,000 to Telisai Co-operative but I direct Asia Suria to pay this set of costs. In so far as costs between Asia Suria and Zhen Dong Plantation I award cost of RM40,000 payable by Asia Suria to Zhen Dong Plantation.